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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 429

BRIAN O. SPARKS, BRANT PHILLIPS, JOHN SCOTT, ROY MOORE, WENDELL L. DANIELSON, FRANK T. HOTOPH, JOHN J. TAYLOR,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,

Interveners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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CIVIL AERONAUTICS BOARD,

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PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,

Interveners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on August 10, 1950. Rehearing was denied on September 6, 1950.

Opinions Below

The opinion of the Circuit Court of Appeals is reported in 184 F. (2d) 66 (1950). A *per curiam* denial of rehearing is unreported.

Jurisdiction

The jurisdiction of this Court is involved under Section 1006 (f) of the Civil Aeronautics Act, 49 U.S.C. 646 (f) and 28 U.S.C. Section 1254 (1).

Questions Presented

The questions presented are the following:

1. Whether Section 801 of the Civil Aeronautics Act, 49 U.S.C. 601, requiring the President to approve certain actions of the Civil Aeronautics Board relating to international, overseas, and territorial air transportation, required or authorized the President to reverse a finding and decision of that Board denying in the public interest the transfer of the certificate of one American-flag international carrier to another.

2. Whether such Presidential review also extends to the acquisition of the assets of one such carrier by another.

3. Whether the President, if he possesses the right to review the denial of a transfer of a certificate, is authorized to make the transfer conditional upon the award of new routes, the award of which was expressly excluded from consideration by the Board in the proceeding relating to the transfer.

4. Whether a Board order that was never adopted at a meeting of the Board but only initialled severally by the members of the Board is a valid adoption of an order by the Board.

Statutes Involved

The pertinent statutory provisions of the Civil Aeronautics Act are the following:

Section 801, (49 U.S.C. 601)

"The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. . . ."

Section 401 (i). (49 U.S.C. 481 (i))

"No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

Section 408 (b). (49 U. S. C. 488 (b))

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the

public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control. . . ."

Statement of the Case

At the opening of this proceeding three American-flag airlines were authorized to engage in scheduled service from United States points over the North Atlantic to Europe. American Overseas Airlines (hereinafter called AOA), a subsidiary of American Airlines, was authorized to serve the northern portion of the European continent through the gateways of Shannon and London. Its greatest traffic points were London and Frankfurt. Pan American World Airways (hereinafter called PAA), operating also from the United States through Shannon and London, had a route from there via certain central European points (including Frankfurt) to Istanbul and thence to India and the Far East where it linked up with its trans-Pacific service. It also had a route from the United States via Lisbon to Marseilles. Trans-World Airways (hereinafter called TWA) was authorized to fly from United States points through Shannon to Paris, Rome and other intermediate points to Cairo and thence to India. It also had a route via Lisbon and Madrid to Cairo either through Rome or through North African points.

The certificates of all these carriers with the exception of PAA's routes to London and Marseilles, had been granted by the Civil Aeronautics Board in 1945 in an overall proceeding entitled the *North Atlantic Route Case*, 6 CAB 319, and were "temporary" in the sense that they expired, subject to the possibility of renewal, in 1952, the theory of the Board being that seven years' experience would enable it to make such necessary adjustments in routes and number of carriers that experience might demand. As against the contention that only one American-flag carrier should be certificated across the North Atlantic, the Board certificated these three carriers upon the theory that it would provide a type of "balanced competition" between American-flag carriers. Such competition, in its opinion, would advance American aviation as contrasted with giving all this traffic to one American air carrier. In the route pattern so certificated, the chief points for traffic were London, Frankfurt, Paris and Rome. The two former were served both by AOA and PAA, whereas the latter two were served only by TWA. Shannon was a common gateway for all three carriers.

Subsequent to the above decision, PAA applied for authority to serve Paris and Rome. This application had been rejected twice with regard to Paris and once with regard to Rome. *First* and *Second North Atlantic Route Amendment Cases*, 7 C. A. B. 133, 455 (1946). A further application for service to these points by PAA was, however, pending at the time of the events in question (C. A. B. Docket No. 2986).

On December 13, 1948, PAA and AOA concluded an agreement for the purchase by PAA of AOA's certificate and assets. The purchase price was to be the book value of AOA's assets payable in PAA stock at the latter's book value. The agreement had a termination date of September

13, 1949. Applications for the approval of the transfer of AOA's certificate and the acquisition of its assets were filed with the Civil Aeronautics Board pursuant to Section 401 (i) and Section 408 of the Civil Aeronautics Act. 49 U. S. C. 481 (i), 488 (b). A number of parties intervened in this proceeding including TWA and the petitioners.

The petitioners are each residents of New York State and employees of AOA. They are acting pursuant to authorization as representatives of over 200 employees of AOA in substantially every category of employment. Some of these 200 employees are also stockholders of AOA. (R. 20)* Their petition to intervene, although exhibiting an interest and concern with such employee protective conditions as might be required in the public interest if the acquisition was approved, was based primarily upon the ground that the transfer of AOA's certificate to PAA was not in the public interest and should be disapproved pursuant to Section 401 (i) of the Act. (RB. 7036-7058). Intervention was permitted by order of the Civil Aeronautics Board. (RB. 7420.)

Following a pre-hearing conference, the Board issued an order (Ser. No. E-2512) instituting a proceeding to determine whether, if the proposed transfer of Overseas to Pan American was approved, the public convenience and necessity would require any alterations or amendments to the certificates of AOA, PAA and TWA. (R. 155-158) This proceeding was consolidated with the pending proceeding relating to the approval of the transfer and acquisition, and

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* By stipulation between the parties only portions of the enormous record of 11,000 pages have been printed, although they have agreed that reference can be made to any portion of it (R. 166-8). For convenience sake the following abbreviations are utilized in referring to this record: P for petitioners' Petition for Judicial Review; PR for petitioners' Petition for Rehearing; A for Affidavits of H. J. Friendly *et al.;* R for the portion of the record printed pursuant to stipulation; RB for the unprinted record before the Board.

the consolidated proceeding was designated as the *North Atlantic Route Transfer Case.* An order clarifying the scope of the entire proceeding was subsequently issued, stating inter alia that a general revision of the North Atlantic route pattern was not under consideration by the Board; that the Board did not intend to determine in this proceeding "whether new services were required in the area covered by the certificates of the transatlantic carriers" and "did not intend to pass upon the question whether new or different services were needed in the area" and was "not presently concerned with that question." (R. 158-165)

Subsequent to this enlargement of the *North Atlantic Route Transfer Case,* Seaboard and Western Airlines, an irregular air carrier and a party to that proceeding, but also an applicant in a separate proceeding for a certificate to carry property only on routes across the Atlantic, moved the Board to consolidate this latter proceeding into the *Transfer Case.* (RB. 7089-7101) This motion was denied by the Board and Seaboard appealed that order to the United States Court of Appeals for the District of Columbia. It was Seaboard's position that the *Transfer Case* would involve a reconsideration of the whole North Atlantic route pattern and that therefore a decision in the *Transfer Case* might prejudice the disposition of Seaboard's application for a certificate to serve that area.

Relying upon the Board's assertions that "it (the Board) does not propose to reconsider, in the Transfer Case, the North Atlantic route pattern," and that "at the utmost it will merely make, as a condition of the approval of the merger, such adjustments between the two remaining carriers as are necessary to maintain a proper competitive balance between them," the Court dismissed Seaboard's appeal. *Seaboard and Western Airlines, Inc.* v. *Civil Aeronautics Board,* 181 F. (2d) 777, 780 (1949).

The Court was careful to point out in its opinion that:

> "If that proceeding should go beyond, or tend to go beyond, the issues as limited by the Board's declarations, Seaboard will have opportunity to protect whatever rights it has in respect of its application. As we have said, it has no initial right to have the area case re-opened; its right is to have its application considered in any proceeding in which general consideration of the area is re-opened." *Id.* at p. 780.

Extensive hearings in which petitioners actively participated were held before an examiner. The hearings ran for many weeks, thousands of pages of testimony were taken and hundreds of exhibits introduced. The acquisition and transfer were challenged by petitioners and the other intervenors on many grounds relevant to the central issue of the public interest involved, among which were the fairness of the agreement, the unlikelihood that it would reduce the subsidy provided by way of airmail pay for the North Atlantic operation, the likelihood that the imbalance created by the merger of AOA and PAA would tend toward a monopoly of air transportation particularly in the light of the far-flung international air transportation system of PAA, and that, in the light of certain monopolistic tactics and restraints of trade pursued by PAA in the past, its expansion and assumption of increased responsibilities was not in the public interest.

Subsequent to this hearing and shortly prior to the termination date of the acquisition agreement, the agreement between PAA and AOA was renegotiated and PAA agreed to pay AOA approximately $17,500,000 in cash for its certificate and assets. A supplementary hearing was held on this second agreement. (RB. 3874)

On December 22, 1949, the Examiner issued his report recommending the approval by the Board of the acquisition.

(RB. 8795-8975) Exceptions to this report and briefs thereon were filed, and oral argument, extending several days, was held before the Civil Aeronautics Board.

On May 17, 1950, the Board adopted an opinion and order disapproving the transfer and acquisition. (RB. 10585-10749) The contents of the several opinions of the Board members may be summarized as follows. The Chairman and Member Adams concluded that the proposed acquisition would result in an increase in mail pay with a consequent increase in costs to the public; that as a result of the acquisition and transfer Pan American would enjoy such a predominant position in the North Atlantic trade as to threaten effective competition in American-flag air operations, and that a rearrangement of routes between the remaining American-flag carriers in the limited manner in which this could be done in the pending proceeding could not overcome these objections, and that consequently the proposed acquisition and transfer were in all respects adverse to the public interest. Member Jones reasoned that it would not be consistent with the public interest to change radically the route pattern across the North Atlantic by eliminating one of the American-flag carriers on the basis of this record, and, since the Board in 1952 would be required to re-examine fully the entire picture on the basis of the seven year experiment it originally ordered, the transfer and acquisition should be disapproved. Member Lee concluded that the proposal was inconsistent with the public interest, but believed that if TWA were given London these objections would be overcome. Member Ryan concluded that the proposal was in the public interest and should be approved.

On June 1, 1950 the Civil Aeronautics Board transmitted its opinion and orders to the President for his approval. This approval was originally given and the orders were signed by the President and returned to the Board late in

the afternoon of June 29, 1950. These orders were recalled for reasons never officially disclosed by the President's office on the morning of June 30, 1950 before the Board had issued or made public its opinion and the orders as originally approved. (P. 7; PR. 33; R. 7, 139)

The President subsequently on July 10, 1950, instructed the Board to issue an order approving the transfer conditioned upon allowing PAA to serve Paris and Rome, and allowing TWA to serve London and Frankfurt. (R. 147) At the same time the original order disapproving the acquisition was returned to the Board, the President's original signature having been eradicated from it. (R. 7)

That same day a Board meeting was held and a majority of a quorum of the Board voted to issue an order pursuant to the President's directive. (PR. 33; R. 139) An order to that effect, containing certain incidental provisions relating to employee protective conditions among other things, not embraced in the President's directive, was prepared the following day, July 11, 1950. (PR. 33; R. 139) No Board meeting was subsequently held approving this order. It was, however, initialed by the individual members (PR. 33; R. 139) of the Board and transmitted, together with a revised opinion of the Board, to the President on July 11, 1950. It was returned to the Board on the same day with the approval of the President. (P. 8; R. 8)

Neither the opinion of the Board (R. 142-153) nor the order of the Board signed by the President on July 11, 1950, (R. 153-5) contains findings to the effect that the transfer of AOA's certificate is consistent with the public interest or that the amendments to the certificates of PAA and TWA are in the public interest. The Board's opinion does, however, contain a finding that, given the transfer of the certificate, the acquisition by PAA of the assets of AOA is in the public interest. (R. 149)

On July 21, 1950, petitioners and TWA severally filed petitions to review the orders of the Board in the United States Court of Appeals for the Second Circuit, moving that Court for a stay of the order of the Board pending final determination of the cause. Petitioners' petition, as distinguished by TWA's petition, named only the Civil Aeronautics Board as respondent. The two cases were not consolidated but oral argument was held on both before Judges Swan, Clark and Frank in New Haven on July 26, 1950. PAA and AOA (including its parent, American Airlines) were granted, without objection, the right to intervene in petitioners' cause. (R. 92, 93) At the oral argument on the motion to stay, PAA and AOA moved to dismiss petitioners' proceeding on the ground that petitioners had no standing to prosecute the cause and on the ground that the court pursuant to the case of *Chicago & Southern Airlines* v. *Waterman S.S. Co.*, 333 U. S. 103 (1948) was without jurisdiction to review the Board's order. (R. 88, 91-2) No such motion was filed by PAA and AOA in the TWA proceeding, nor was any such motion filed by the respondent, Civil Aeronautics Board in either cause, although it was stated orally that the Board intended thereafter to file such a motion.

On August 14, 1950, the Court of Appeals rendered its decision dismissing both petitions for want of jurisdiction. (R. 93-102) On August 29, 1950, petitioners pursuant to the rules of that Court filed a petition for rehearing contending that, not only had the Court been in error in holding that the original decision and order of the Board disapproving the acquisition was subject under Section 801 of the Civil Aeronautics Act to the approval of the President, but that due to a misunderstanding of the representative status of the petitioners, occasioned by a false affidavit and a false statement filed respectively by counsel for PAA and AOA,

the Court erroneously failed to consider points material to the determination of the cause raised in these proceedings by petitioners, as distinguished from TWA,—points that petitioners were entitled to raise pursuant to *Federal Communications Commission* v. *Sanders Bros.*, 309 U. S. 470 (1940), and *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4 (1942). On September 6, 1950, the Court of Appeals denied this petition for rehearing *per curiam*. (R. 141) Certiorari is now being sought from these decisions of the Court of Appeals.

Specification of Errors to Be Urged

The Court of Appeals of the Second Circuit erred:

1. In holding that the denial by the Civil Aeronautics Board of an application for the transfer of a certificate of public convenience and necessity in international air transportation required the approval of the President of the United States contrary to the provisions of Section 801 of the Civil Aeronautics Act.

2. In not considering petitioners' contention that the directive given in this cause by the President, if he had authority in the cause, extended to requiring the Civil Aeronautics Board to determine a matter not in issue in the proceeding, namely, the granting of new routes and services to PAA as a condition of the approval of its application for the transfer of the certificate of AOA to PAA.

3. In not considering petitioners' contention that the order in question of July 10, 1950, alleged to have been adopted by the Civil Aeronautics Board was never in fact adopted by the Board acting as a Board.

4. With regard to 2 and 3 above, in not deciding the contentions thus advanced by petitioners, presumably on the basis that petitioners had no standing to raise these issues,

contrary to the earlier decisions of that Court and the Supreme Court of the United States.

5. In holding that since the transfer of the certificate from AOA to PAA required the approval of the President of the United States, his approval was also required for the acquisition by PAA of the assets of AOA, contrary to the provisions of Section 801 of the Civil Aeronautics Act.

Reasons for Granting the Writ

I

The Court of Appeals in holding that Presidential approval under Section 801 of the Civil Aeronautics Act extended to the deni by the Civil Aeronautics Board of an application for the transfer of a certificate in international air transportation "decided an important question of federal law which has not been, but should be, settled by this Court". (Rule 38, para. 5 (b) of the Rules of the Supreme Court.)

There is no issue but that this question has never before been determined by the Supreme Court. The only issue thus is as to its importance and whether the decision of the Court of Appeals is so plainly right as not to warrant review by this Court.

1. *The Importance of the Question:*

The significance of the question at issue seems fully to have been recognized by the lower Court. Although the hearing before that Court was on the question of a stay, it determined to dismiss the cause for want of jurisdiction, saying that "an immediate decision on this issue may accelerate the parties' access to the Supreme Court, if they are disposed to seek it". (R. 101) With regard to this case alone the resolution of this question in the manner in which the Court of Appeals has resolved it, has meant that con-

trary to the considered opinion of a majority of the Civil Aeronautics Board, rendered after extensive hearings and argument, the President has required that Board to eliminate one trans-Atlantic air carrier and to create a route pattern for international air carrier operations across the North Atlantic far different from the pattern originally established by that Board in 1945, and thereafter consistently adhered to by it. The President upon his own initiative and without notice or hearing thus set at naught the findings of the majority of that Board that the proposed transfer was not in the public interest.

Apart from the great public importance of this case, which may well fasten upon American aviation a pattern of competitive unbalance and monopoly in international air transportation that it may take decades to remove, further mergers and acquisitions in this field of air transportation are more than likely. With regard to this "merger" and those to come, the fundamental issue raised is whether the route patterns of the future will be dictated in camera by the President of the United States or determined by an allegedly independent Civil Aeronautics Board, subject only to such limited approval by the President as a correct and fair reading of Section 801 of the Civil Aeronautics Act requires. In the field of international air transportation—probably the most important and vital field of future transportation of all kinds—it is highly important that the areas of action by the President and by the Civil Aeronautics Board be delineated by the high authority of this Court in the manner in which the statutes and the Constitution of the United States require.

Furthermore, the question involved is a vital one in the general field of administrative law. Admittedly the *Waterman Case, supra,* is authority for the fact that Congress can confer on the President an unreviewable and ultimate

power to decide certain issues relating to international air transportation which involve broad and delicate issues of foreign policy—matters traditionally within the responsibility of the Executive. But in this case the statute literally construed gives the President no such power, and, since the Board declined to approve the transfer, no delicate issues of foreign policy are presented to call for vesting in the President an authority not required for the efficient exercise of his high office. Consequently to remove the decision of the question from all judicial scrutiny is required neither by the statute nor by the basic philosophy of the *Waterman Case* and violates basic conceptions of the rule of law.

2. *The Correctness of the Lower Court's Decision:* The decision of the lower court admittedly departs from the literal grammatical construction of Section 801 of the Civil Aeronautics Act. The justification for doing so, according to the lower Court rests on four grounds: (a) That "the meticulously literal reading" of the statute contended for by petitioners "is negated by the broad sweep of the doctrine in the Waterman Case" (R. 99-100); (b) that since denials of amendments raise issues of delicate foreign policy calling for Presidential approval of action, denials of transfers should be subjected to the same requirement of Presidential review (R. 100); (c) that the language of the second sentence of Section 801 leads to the conclusion that Presidential review is required of denials of transfers as well as the approval of such transfers by the Board (R. 100); and (d) that, inasmuch as the present proceeding had been broadened by the Board to include a possible revision of routes, whatever the general rule might be, a denial of a transfer in this case was subject to Presidential review. (R. 100)

With regard to the first contention of the lower Court, namely, that the "broad sweep" of the *Waterman Case*

calls for the liberal construction that Court indulged in, two things are to be observed. The first is that the *Waterman Case* does not deal with this issue. The *Waterman Case* related only to the judicial reviewability of Presidential action in a situation where he was admittedly given the power to review Board action. There is certainly nothing in the *Waterman Case* which calls for the conclusion that decisions of the Board in international air transportation having no diplomatic repercussions must in the absence of an express statutory requirement be subjected to Presidential review, simply because they do relate to the field of international air transportation. It could, indeed, be urged that Board action which requires further diplomatic implementation, even in the absence of express statutory requirement, under the *ratio decidendi* of the Waterman doctrine would have to be submitted to the President for approval. But a denial of a transfer, as the lower Court wholly failed to recognize, calls for no subsequent diplomatic implementation.

In the second place, the lower Court appears to have assumed that the *Waterman Case* established the President as the chief architect of the international air route pattern, with authority and responsibility extending to every major facet of international air transportation. Although it was pointed out to the lower Court both on brief and in argument (PR. 27; R. 138) that such a concept is far from true, the lower Court totally ignored this contention. Had its premises as to the respective roles of the President and the Board been rooted in the hard facts of administrative practice, it could hardly have dismissed petitioners' contentions as a mere plea for a "meticulously literal reading" of the statute. Petitioners repeatedly pointed out that Presidential review does not extend to a multitude of matters vitally

affecting international air operations. In this host of matters, so essential to the efficient conduct of our international air transport system, the Board has the sole responsibility. These matters include among others exemptions under which American-flag carriers today are conducting a multitude of international operations, both scheduled and non-scheduled;[1] they include temporary suspension of services in international air transportation,[2] pooling agreements among American carriers one of whom is engaged in international, overseas or territorial transportation,[3] acquisitions by American carriers of the control of other American carriers engaged in international air transportation [4] or of foreign air carriers,[5] important interchange agreements in international air transportation,[6] air

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[1] *Scheduled Service:* First and Second North Atlantic Route Amendment Cases, 7 C.A.B. 133, 455 (1946); PAA between Boston and Bermuda, Ser. No. E. 447 (April, 1947); PAA to Camaguey, Cuba, Ser. No. E-199 (Dec., 1946); PAA to Curacao, Ser. No. E-180 (Dec., 1946). *Unscheduled Service:* PAA to Alaska, Ser. No. 4368 (June 28, 1950). Letters of registration authorizing carriers to engage in irregular or unscheduled international air transportation are also issued without the approval of the President.

[2] See C.A.B. Ser. No. E-470 (April 27, 1947), suspending PAA service to New Caledonia; Ser. No. E-568 (May 23, 1947) suspending PAA service to Barreiras, Brazil; Ser. No. E-490 (May 1, 1947) suspending PAA service between Fairbanks and Bethel, Alaska. See also Ser. E-902 (October, 1947) revoking an earlier suspension of PAA service between San Francisco and Honolulu.

[3] Pan American-Matson-Inter-Island Control, 3 C.A.B. 540 (1942); Pan American-U.S. Lines Agreement, 8 C.A.B. 609 (1941); Alaska Coastal Airlines et al., Juneau Mail Routes, 8 C.A.B. 127 (1947).

[4] American Airlines, Control of American Export Airlines, 6 C.A.B. 371 (1945); National-Caribbean Atlantic Control Case, 6 C.A.B. 671 (1946).

[5] Pan American, Acquisition of China National, 6 C.A.B. 143 (1944); United Air Lines, Acquisition of Lamsa, 4 C.A.B. 409 (1943); Braniff Airways, Acquisition of Aerovias Braniff, 6 C.A.B. 947 (1946).

[6] Pan American-Panagra Agreement, 8 C.A.B. 50, 65 (1947).

mail rates in such commerce, and a host of other matters.[7] Indeed, in the very case of the denial of the transfer of a certificate to engage in international, overseas or territorial transportation—the types of transportation covered by Section 801—the Board's practice prior to the present proceeding was not to refer the matter to the President. *Acquisition of Cordova Air Service by Alaskan Airlines*, 4 C. A. B. 708 (1944). As counsel for the Board themselves have said *arguendo* in *Pan American-Grace Airways, Inc.* v. *Civil Aeronautics Board*, 178 F. (2d) 34 (1949):

> "The Board exercises many powers 'in respect of' a certificate for foreign air transportation which are not subject to approval by the President.
>
> "It is the Board alone that determines the mail rates that shall be paid to carriers operating routes in foreign air transportation notwithstanding the fact that but for substantial government subsidy in the form of mail pay granted to such operators, few of the routes found to be necessary by the President could have been developed or maintained (Section 406). It is the Board acting independently that approves or disapproves consolidations, mergers, or acquisitions of control affecting such carriers and routes (Section 408) and approves agreements between such carriers relating to such matters as pooling, the establishing of rates, the regulating and preventing of competition and other cooperative working arrangements (Section 412). It is the Board acting alone that issues orders pursuant to section 416 (b) exempting such carriers from the provisions of the Act so as to authorize the holder of a certificate to conduct services, frequently of major importance, not authorized by the certificate. It is the Board acting alone that issues orders pursuant to sec-

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[7] *Cf.* Pacific Northwest-Hawaii Case, 8 C.A.B. 149 (1947) (denial of exemption to serve Seattle-Hawaii); Pan American-Grace Airways, Inc. *v.* Civil Aeronautics Board, 178 F. (2d) 34 (D.C.C.A. 1949) (denial of a petition to amend or suspend a competitor's international service).

tion 401 (k) authorizing a carrier to suspend service to foreign or domestic points named in its certificate of public convenience and necessity. It is the Board acting alone which approves nonstop service between points named in a certificate of public convenience and necessity authorizing foreign air transportation, thereby providing for a direct nonstop service which does not stop at each point named in the certificate. (Section 401 (f); Economic Regulations Section 238.4). All of these actions have been taken time after time in numerous cases, and Panagra has been the beneficiary of orders of this kind in proportion to its size and the scope of its operations.

"And even in those proceedings where the final decision of the Board is subject, pursuant to section 801, to approval of the President the Board exercises important functions in which Presidential approval plays no part. The Board alone determines the order in which applications proposing foreign air transportation shall be heard. It determines whether several of such applications will be consolidated for hearing in a single proceeding; it determines all intermediate procedural matters and, where applicants so request, it dismisses applications for certificates in foreign air transportation without submitting such matters to the President.

"When section 801 is viewed in the light of the roles of the President and the Board in their respective zones of authority, it becomes apparent that Congress did not intend to vest in the President blanket powers over all Board action affecting foreign air transportation, but only to grant to him important—and final—authority in a restricted field." (Brief, Pp. 40-42)

Running through these situations where no Presidential review is required is the central fact that Board action of the types there mentioned involves no serious issues of foreign policy and requires no further diplomatic implementation. This is also true of the denial of the transfer of a certificate. The approval of such a transfer, however,

does raise serious diplomatic problems and the statute rightly makes this subject to Presidential approval. If a transfer is approved, new permits must be gotten by the acquiring carrier from foreign governments and the applications for these permits, to say nothing of their issuance, calls for the intervention and help of the State Department. Whether or not the Executive should be obliged to act in behalf of an American carrier to secure such permits raises serious diplomatic issues. Naturally the question as to whether the State Department should assume such a burden is for the President and not the Board to decide. But a denial of a transfer raises no faintly comparable issue. A denial requires no further diplomatic implementation of any kind, so that no reason of policy exists for requiring Presidential approval of Board action denying the transfer of a certificate.

The denial of a transfer of a certificate is far different from Board action denying the issuance of an original certificate, which is expressly made subject to Presidential review. The latter raises a basic question as to whether American-flag service should be extended for reasons relating to commerce and the national defense to some new foreign area. With such an issue the Executive has an obvious concern. But a denial of a transfer never raises any issue as to a new service, since the services have already been certificated; it raises merely the operational question as to whether a service theretofore rendered by two American-flag carriers should now be conducted by one.

The lower Court did not argue that denials of transfers should be subject to Presidential approval because denials of original certificates were so subject; but it did argue that denials of transfers should be Presidentially approved since denials of amendments of certificates—also not expressly made subject to Presidential approval by the

Statute—should be subject to Presidential review since these latter denials involved delicate issues of foreign policy. In doing so, however, the lower Court mistook completely the meaning of "amendments" as employed by the Statute. Since for technical reasons, as petitioners pointed out (PR. 22-3; R. 128-9), applications for new certificates are frequently cast by applicants in the form of an amendment to an old certificate,[8] these "amendments" do raise the type of policy considerations adverted to by the lower Court. But the term "amendment" as used in the Statute both historically and as a matter of common sense has a greatly restricted meaning (PR. 23-4; R. 129-130). Construed in the light of history and in the light of the normal meaning of that term, the denial of an amendment raises no such issues of delicate foreign policy as the lower Court envisaged.[9] Indeed, the lower Court permitted a

[8] The reason that carriers apply for new routes in the form of amendments to existing routes is to avoid so-called terminal points since these cannot be overflown under the existing regulations of the Board. Thus if a carrier has a route from A to B with C designated as an intermediate point, and it wishes to apply to fly from C to D, it would do so by seeking an amendment to its A-C route. This will enable it, if it so chooses, to fly from A to D non-stopping C. If it had only a new route from C to D it could not nonstop C on flights between A and D, since C is a terminal point on the C-D route. Pan American, for example, applied for and was granted a 2400 mile route from Honolulu to Portland and Seattle in terms of an amendment of its certificate to operate from San Francisco and Los Angeles to Honolulu, Tokyo, Shanghai and other Far Eastern points. *In the Matter of Matson Navigation Co.*, 9 C.A.B. 580 (1948). In argument in the instant case counsel for Pan American claimed *Continental Air Lines, Inc., Texas Air Service*, 4 C.A.B. 478 (1943) was authority for requiring a denial of an application for an amendment to be submitted to the President for his approval. Although in that case the application was cast in the form of an amendment and its denial was submitted to the President for his approval, what was actually applied for was a new route linking San Antonio in Texas for the first time with the Mexican city of Monterey. As such it was obviously proper to submit the Board action to the President for his approval.

[9] Typical of such a case would be the denial of an amendment authorizing service to a point in a country already being overflown by the carrier, such as Bristol, England, on the Shannon-London route.

form of practice, followed by applicant air carriers for totally different reasons, to control its substantive interpretation of language in the Statute which has a different historic meaning.

The third contention of the lower Court rests upon an interpretation of the second sentence of Section 801 of the Act. This requires copies of all applications "in respect of such certificates" to be transmitted to the President at the time they are filed with the Board, and "all decisions thereon" by the Board to be submitted to the President before publication. This sentence, the lower Court insists, would be meaningless unless both denials and approvals were to be subject to Presidential approval. Obviously, since at the time of filing it is impossible to know whether an application will be denied or approved, the transmission of all applications to the President becomes essential. The phrase relating to "all decisions thereon" has also an obvious reference to the first sentence, meaning all decisons that by the first sentence are subject to Presidential approval. Were the Court's interpretation of the second sentence correct, the language of the first sentence expressly making Board denials of new certificates as well as decisions involving such certificates subject to Presidential approval would be mere surplusage.

The Court's final contention, namely that since the case involved the possibility of new routes being certificated as well as the transfer of AOA's certificate to PAA and that therefore this case should have been submitted to the President for approval, whatever the general rule may be, clearly misconceives the entire proceeding before the Board. As the Board stated again and again in its orders dealing with the scope of the proceeding, if the transfer was to be denied no new routes were to be certificated. That fact makes meaningless this portion of the lower Court's argument.

It is to be observed that, if the Board's order of May 17, 1950, was not subject to Presidential approval by virtue of the Statute,[10] that order is today an effective order. If the Board's action in voluntarily making that order subject to Presidential approval be deemed valid, that approval was given. Even though it may be admitted that the President in cases where he acts in a quasi-judicial manner has the power to recall an approval once given prior to publication, such a doctrine has no place in instances where the President acts in a different capacity, such as in an executive or ministerial capacity. In such instances, as this Court long ago recognized, action once taken is final and irrevocable. *Marbury* v. *Madison*, 1 Cranch 137 (1803); *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899).

II

In not considering petitioners' contention that the President, if he had authority in the cause, acted beyond the scope of the proceeding in granting a new route to PAA, the lower Court departed "so far from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision", as well as by so doing it reached a conclusion in conflict with the decision of the Court of Appeals of the District of Columbia on the same matter. (Rule 38 (5) (b)).

It cannot be denied that in giving PAA entry into Paris and Rome, PAA was awarded a series of new routes. Under its certificate as amended at the President's direction PAA is authorized to fly from Shannon or London to Paris, Frankfurt to Paris or Rome, Marseilles to Rome, as well as

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[10] Counsel has heretofore stated that under these circumstances the conditions attached to the Board's order for Presidential approval were invalid. They still think so but for the purposes of this petition the agreement is not essential.

a series of other routings. All of the above routes, with the exception of Shannon-Paris had never before been certificated to or flown by any American-flag carrier. The Shannon-Paris route was then being flown by TWA, but the award to PAA was not the transfer to it of TWA's route but the creation of a new route.

Petitioners contended in brief and argument before the lower Court, as well as on petition on re-argument, that no new routes were at issue in this proceeding and that, if they were, PAA had never truly put in issue these routes. The lower Court ignored petitioners' contentions.

It certainly cannot be true that in a proceeding, which we will assume is subject to Presidential approval, the President can order the Board to make awards beyond the scope of the proceeding itself. If an applicant applies for a route from A to B, neither the Board nor the President can award him a route from X to Y. Such action, certainly never sanctioned by the *Waterman Case,* would go beyond the very requirements of due process. *Morgan* v. *United States,* 298 U. S. 468 (1936).

As petitioners expressly pointed out, the Board in its clarifying order (Ser. No. E-2833) as to the scope of the proceeding said of its earlier order:

> "Nor did we intend to determine in the 401 (h) proceeding whether new services were required in the area covered by the certificates of the transatlantic carriers." (R. 162)

And again in the same order the Board once more said:

> "As indicated above, in instituting the 401 (h) proceeding we did not intend to pass upon the question whether new or different services were needed in the area under consideration, and we are not presently concerned with that question." (R. 163)

The Court of Appeals of the District of Columbia took the Board at its word. Seaboard & Western Airlines, a party to the *Transfer Case* before the Board, had a prior application pending before the Board requesting authority for an all cargo operation from American to European points. Fearing that that application would be prejudiced by the *Transfer Case*, it requested that its proceeding be consolidated into the *Transfer Case*. The Board denied this request. On appeal to the Court of Appeals of the District of Columbia that decision of the Board was affirmed but on the express representation of the Board that the *Transfer Case* did not involve the grant of new routes and new services. *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. (2nd) 777 (1949). That Court in this respect said at p. 780 of its opinion:

> "The Board's position appears to be neither unreal nor unreasonable. It does not seem to us that in reallocating, because of a merger, *existing routes between existing carriers* it need enter upon consideration of the whole problem of North Atlantic routes and carriers, and we think we must rely upon the Board's declarations, formally entered in its orders and declared to us in its briefs, in respect to the scope of the proceeding which it has instituted. Seaboard has been permitted to intervene in the proceeding and thus has full opportunity to know what is being done in it. If that proceeding should go beyond, or tend to go beyond, the issues as limited by the Board's declarations, Seaboard will have opportunity to protect whatever rights it has in respect of its application. As we have said, it has no initial right to have the area case reopened; its right is to have its application considered in any proceeding in which general consideration of the area is reopened." (Italics supplied)

Moreover, the question as to these new routes given by the President to PAA was never truly put in issue by PAA.

It is unnecessary here to deal with the manner in which the issue of these routes was raised as a purely defensive measure by PAA. That matter is fully set forth in pages 8 to 18 of Petitioners' Motion for Reconsideration and Rehearing and the Court is respectfully referred to those portions of the record. (R. 114-124) As evidentiary of this fact, it is worth noting that PAA at the time of this Proceeding had on file with the Board an application to serve Paris and Rome, the very routes granted it in this proceeding. (C.A.B. Docket No. 2986). But at no time did PAA ever move to consolidate that application into the *Transfer Case*.

In this respect, this case differs wholly from *Chicago and Southern Air Lines* v. *Civil Aeronautics Board*, where this Court recently denied a writ of certiorari. (71 Sup. Ct. 66 (1950)) In that case the Board had made no finding as to the fitness, willingness and ability of an applicant air carrier because it denied the application on the ground that the route applied for was not required by the public interest. Later at the President's direction it granted the certificate applied for, still making no finding on the issue as to the fitness, willingness and ability of the applicant air carrier. This issue, however, was admittedly raised in the proceedings before the Board. Here the President's "findings" and order went beyond the scope of the proceedings before the Board and decided a matter—new routes for PAA—expressly excluded by the order of the Board itself from consideration in the proceeding.

III

In not considering the petitioners' contention that the Board's order of July 10, 1950, was never adopted the lower Court departed "so far from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Rule 38 (5) (b)).

The order of July 10, 1950—the second order of the Board which the lower Court held to be valid—was never adopted by the Board. It was never even in existence on that date and was only completed the following day. After completion it was never adopted at any meeting of the Board but only initialled separately by each member of the Board, prior to its submission on July 11, 1950 to the President for his approval. Subsequent to the President's approval, the order was published without further action by the Board. The only Board action ever "approving" the order alleged to have been approved on July 10 was a meeting of the Board held that day authorizing the drafting of an order generally along the lines of that initialled by the individual members the following day.

The action taken by the Board on July 10, 1950 is clearly not the equivalent of the approval of an order or the adoption by the Board of an order. It was merely a directive for the preparation of an order whose details were still unsettled. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950).

Individual initialling by the Board members of an order does not constitute Board action, which is essential for the adoption of an order. This is the settled requirement in other comparable fields. The reason for this rule was well stated in *Cammeyer* v. *Lutheran Churches*, 2 Sandf. Ch. 208,

229 (1844), and was quoted in *Kansas City Hay-Press Co.* v. *Devol,* 72 Fed. 717, 722 (W.D. Mo., 1896):

> "The directors in the bank, and the trustees, in this case, are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them, they must meet as a board, so that they may hear each other's views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers."

Numerous authorities support this proposition. *Schuckman* v. *Rubinstein,* 164 F. (2d) 953 (C.C.A. 6, 1947); *Clavelle* v. *Washington Trust Co.,* 226 Fed. 400 (C.C.A. 9, 1915); *Lee County* v. *James,* 178 Miss. 554, 174 So. 76 (1937); *Stanley* v. *Board of Appeals,* 5 N.Y.S. (2d) 956, 168 Misc. 797 (1938).

IV

The lower Court's failure to consider issues raised by petitioners with regard to points three and four is clearly due to its having regarded petitioners as having no standing before it to raise these issues and, as such, the lower Court "has decided a federal question in a way probably in conflict with applicable decisions of this Court" as well as the lower Court itself. (Rule 38 (5) (b)).

There is no question but that the lower Court failed to consider the contentions advanced by petitioners contained in two and three above. It is also clear, moreover, from a reading of the lower Court's opinion that it considered none of the contentions advanced by petitioners. This is disclosed by two facts. The first is that the lower Court did not consider any contentions advanced by petitioners, which were not raised by TWA. The second is that in deal-

ing with petitioners' contentions that were also advanced by TWA, and which petitioners had buttressed by argument of a character dissimilar to that of TWA and supported by other authorities, the lower Court in deciding on these contentions adverts neither to petitioners' arguments nor cites a single authority cited by petitioners but not cited by TWA.

This action of the lower Court seems to have been due to its misapprehension of who petitioners were and a consequent implicit conclusion that petitioners had no standing before it. True, the lower Court did not rule on the motions to dismiss petitioners' petition for review for want of a substantial interest inasmuch as the entire cause was dismissed for want of jurisdiction, but as a matter of fact it dealt with petitioners exactly as if it had granted those motions.

Such action was error. How the lower Court fell into this error is apparent. Petitioners were originally granted the right by the Board to intervene as parties in the *Transfer Case* in a representative capacity, as representing more than two hundred employees of AOA who had a substantial interest in the outcome of the cause,—an interest that extended beyond mere so-called employee protective conditions to the essential question of whether the transfer of AOA's certificate to PAA was in the public interest. Later petitioners also established the fact that certain of the employees they represented were stockholders of AOA. They actively participated in the case emphasizing particularly that the transfer in their opinion was not in the public interest. In the hearings before the trial examiner they sustained successfully the fact that they were acting in a representative capacity—a fact that was not challenged thereafter before the Board by PAA or AOA. (Pr. 3-5; R. 109-111). They set forth this fact of their representative

capacity in their petition for review to the lower Court and supported that fact by sworn statements. (P. 1; R. 20)

Unfortunately misleading statements to the contrary were made to the lower Court by counsel for AOA (R. 108, 109) and in an affidavit by counsel for PAA (A. 25; R. 48). On the basis of these statements these two counsel moved to dismiss petitioners' proceeding for lack of a substantial interest (R. 88, 91-2). No such allegations were made by counsel for the Board nor was any similar motion made by him, although it was argued by counsel for the Board (wrongly in petitioners' opinion) that petitioners' interest extended only to the employee protective conditions. That the lower Court accepted as true the erroneous allegations [11] of counsel for AOA and PAA seems apparent from the statement in its opinion that "Brian O. Sparks and six other employees of Overseas are the petitioners." (R. 94) This erroneous conclusion of fact—a conclusion that could not have been made on the moving papers alone and one that is contradicted by the record itself—undoubtedly led to the lower Court's ignoring all petitioners' contentions.

That petitioners did have a substantial interest is not open to doubt. Taken at its narrowest, it extended to the matter of their protection as employees, *United States* v. *Lowden,* 308 U. S. 225 (1939), and once such an interest is established, under the authority of this Court as well as the lower Court, petitioners' right of review extends to every relevant issue in the case, particularly those relating to the public interest. *Federal Communications Commission* v. *Sanders Bros.,* 309 U. S. 470 (1940); *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4 (1942); *Associated Industries* v. *Ickes,* 134 F. (2d) 694 (C.C.A. 2, 1943). This principle of law is too clearly estab-

[11] The proof as to the falsity of this affidavit and the statement referred to, is set forth in the Petition for Rehearing, pp. 2-5. (R. 108-111)

lished by these cases to require argument or elaboration. True, these cases dealt with statutes giving "parties aggrieved" the right to appeal from an administrative order and to raise the issue of public interest there presented, whereas the Civil Aeronautics Act, Section 1006 (a), 49 U.S.C. 646 (a), confers this language on parties possessing a "substantial interest". The meaning of the two statutes is the same, however, for surely parties who have a "substantial interest" are those parties who are "aggrieved" by adverse administrative action.

Petitioners also were minority stockholders of AOA. Both as employees and as stockholders their interests were likely to be affected adversely in a pecuniary way more seriously by the contemplated transfer than a competitor such as TWA. To toss them out of the case, as the lower Court in essence did, was a grave error in the application of settled federal law.

V

The lower Court wrongly decided an important question of federal law, as yet undecided by this Court, when it held that the requirement for Presidential approval in this cause extended not only to the transfer of the certificate but to the acquisition of the assets of AOA by PAA. (Rule 38 (5) (1))

This conclusion of the lower Court is at variance with the Statute, the action of the Civil Aeronautics Board, and seems contrary to the lower Court's own previous holding in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. (2d) 801 (1941).

The Statute in terms rightly does not call for Presidential approval of the acquisition of the assets of one international air carrier by another. The reason for this is plain, inasmuch as these issues raise complicated questions of the

fair treatment of minority stockholders, and the appropriateness and fairness of the purchase price—questions for quasi-judicial determination and wholly undesirable for determination by unreviewable Presidential action.

The Board itself recognized this fact, for, although it made no findings of fact relating to the public interest underlying the transfer of the certificate, since in this matter it rested on the President's directive, it expressly found pursuant to Section 408 of the Civil Aeronautics Act that, given the transfer of the certificate, the acquisition of AOA's assets by PAA "is consistent with the public interest and will not result in the creation of a monopoly and thereby restrain competition or jeopardize another carrier not a party to the acquisition" (R. 149). The Board obviously made this finding because it deemed it essential to the validity of that portion of its order approving the acquisition of the assets as distinguished from the transfer of the certificate.

The lower Court's conclusion also seems contrary to its earlier decision in *Pan American Airways Co.* v. *Civil Aeronautics Board, supra.* In that case an order of the Board, approved by the President, authorized the issuance of a certificate to American Export Air Lines, Inc., and authorized American Export Lines to acquire the control of the latter. The order was an entirety and approved as such by the President. *American Export Airlines, Inc.*, 2 C. A. B. 16, 52-3 (1940). On review in Second Circuit Court of Appeals, it was held that the issuance of the certificate was not reviewable but that the question of the acquisition of control was reviewable. That case was never adverted to in this connection by the lower Court. It can be distinguished from the instant case in that the issue in that case related to the acquisition of control rather than of assets, but the grounds for distinction are certainly not substantial.

Extending the purview of Section 801 far beyond its language is justifiable neither by the *Waterman Case* nor by considerations of policy, for the issues involved in an acquisition of assets are clearly not of the type appropriate for unreviewable Executive determination. The correction of that error by the lower Court, it is submitted, is desirable in the light of the significance of this problem to the aviation industry as a whole.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 429

BRIAN O. SPARKS, BRANT PHILLIPS, JOHN SCOTT, ROY MOORE, WENDELL L. DANIELSON, FRANK T. HOTOPH, JOHN J. TAYLOR, PETITIONERS

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 93) is reported at 184 F. 2d 66.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1950 (R. 102). A petition for rehearing, filed on August 29, 1950 (R. 138), was denied on September 6, 1950 (R. 141). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Although the petition (p. 2) seeks to raise several questions, we believe that the following question is dispositive of the case:

Whether the order of the Civil Aeronautics Board, approved by the President, allowing a transfer of a certificate for overseas air transportation and amending other such certificates, is an order subject to presidential review under Section 801 of the Civil Aeronautics Act and as such not subject to judicial review under Section 1006 of the Civil Aeronautics Act.

STATUTE INVOLVED

The pertinent portions of Sections 801 and 1006 of the Civil Aeronautics Act (52 Stat. 1014, 1024, 49 U. S. C. §§ 601, 646) provide:

> SEC. 801. The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions

thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof. * * *

SEC. 1006.

(a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. * * *

STATEMENT

At the start of this proceeding there were three American-flag carriers certificated to engage in scheduled service from the United States via the North Atlantic route to Europe (R. 65): Pan American World Airways (PAA), American Overseas Airlines (AOA), and Trans-World Airways (TWA). The route pattern under which they operated had been adopted by the Civil Aeronautics Board in 1945, in a proceeding entitled the *North Atlantic Route Case,* 6 C. A. B. 319 (R. 32). Under that pattern the chief traffic points served in Europe were London, Frankfurt, Paris, and Rome; PAA and AOA both served London and Frankfurt while TWA alone served

Paris and Rome (R. 65–66). Shannon was a common gateway for all three carriers (R. 65–66).

In 1948, PAA and AOA entered into an agreement calling for the purchase by PAA of the properties of AOA and the transfer to PAA of AOA's certificate of public convenience and necessity (R. 77). PAA and AOA then applied to the Civil Aeronautics Board for approval of that agreement and the Board instituted this proceeding, denominated the *North Atlantic Route Case* (R. 159). The Board allowed numerous parties to intervene, including TWA and petitioners herein (R. 146). Petitioners intervened as representatives of some two hundred employees of AOA of whom a number were stockholders of that company (R. 20).

Concurrently, in response to motions by TWA and others, the Board instituted a proceeding under Section 401 (h) of the Act to determine whether the certificates of PAA, AOA, and TWA should be altered, amended or modified in whole or in part, limited to an examination of the routes of those carriers to determine adjustments that would be required in the public interest if the transfer of the assets and certificates of AOA to PAA were approved (R. 159–160). This proceeding was consolidated with the *North Atlantic Route Case* (R. 160).

Following full and lengthy hearings, in which petitioners and other interested parties participated, the Civil Aeronautics Board on June 1,

1950, transmitted to the President, pursuant to the provisions of Section 801 of the Act, its opinion and order disapproving the applications of PAA and AOA (R. 146). On June 29, 1950, the President approved and signed the order and returned it to the Board (R. 7). The order was not, however, published and, on the following day, June 30, the President verbally directed that the opinion and order be returned to him (R. 7). This was done, and, on the same date, the President caused his signature to be eradicated. Thereafter, the President requested and received the views of the members of the Board with respect to questions involved in the *North Atlantic Route Case* upon which he desired further advice (R. 96). Subsequently, on July 10, 1950, after receipt of such advice, the President directed the Board, by a letter of instructions, to issue an order approving the transfer of the assets and certificate of AOA to PAA and designating certain route changes in conjunction with the transfer (R. 147). Those changes, in summary, permitted TWA to fly to London and Frankfurt, and PAA to fly to Paris and Rome (R. 147). Pursuant to this directive, the Board on July 10 and 11, 1950, adopted and executed an order, opinion, and amended certificates for TWA and PAA in conformity with these instructions (R. 153). The Board's order specifically provided that it would retain jurisdiction of the proceeding "for the purpose of imposing such em-

ployee protective conditions as the Board may hereafter find to be appropriate and in the public interest," and directed further that persons employed by PAA and AOA should not be discharged "other than for good cause shown until further order of the Board." The documents evidencing the Board's actions were again transmitted to the President, who approved and signed them on July 11, and returned them to the Board (R. 155). It is this order of which petitioners seek review.

On July 21, 1950,[1] petitioners and TWA severally filed petitions in the United States Court of Appeals for the Second Circuit to review the Board's order and moved to stay the order pending the court's decision (R. 1, 94). PAA and AOA were permitted to intervene in petitioners' suit (R. 92, 93). Oral argument on both motions to stay was heard on July 26, 1950. At the argument, PAA and AOA moved to dismiss petitioners' suit both because the court lacked jurisdiction to review the order and because petitioners

[1] On July 12, 1950, an action for an injunction seeking to restrain the Board from issuing the Order of July 11, 1950, was brought by petitioners and Seaboard & Western Airlines, Inc., in the United States District Court for the District of Columbia (C. A. No. 2989–50). This action challenged the validity of the Order of July 11, 1950, upon substantially identical grounds as those asserted here. An *ex parte* temporary restraining order was issued on July 12, 1950. Following a hearing upon the Government's motion, it was dissolved on July 17, 1950. There have been no further proceedings in connection with this action.

were without standing to contest that order (R. 88, 91).

On August 14, 1950, the court of appeals dismissed both petitions for want of jurisdiction to review the orders (R. 102). Petitioners made timely application for a rehearing, contending not only that the court had erred in holding it lacked jurisdiction to review the order but also that the court had ignored certain of petitioners' arguments, presumably because the court had found petitioners without capacity to maintain the suit (R. 107). The petition for a rehearing was denied (R. 141).

ARGUMENT

1. *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, held that orders of the Board which are subject to presidential approval under Section 801 of the Civil Aeronautics Act are not subject to judicial review under Section 1006 of that Act. "The President," said the Court, "both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret" (333 U. S. at p. 111).

The order of the Civil Aeronautics Board which petitioners would have this Court review was

prepared in response to the detailed instructions of the President and published only after his approval. There can be no doubt that the order was one for which the statute required presidential approval, and which, therefore, comes within the rule of the *Waterman* case. The order approved a transfer of AOA's certificate to PAA, and also amended the certificates of both PAA and TWA. Section 801 of the Act expressly requires presidential approval of a "transfer" and of an "amendment" of a certificate authorizing overseas air transportation.

Petitioners argue that the earlier proposed order disapproving the transfer did not require presidential approval and hence would have been judicially reviewable. Even if this argument were valid, we do not see how it could alter the conclusion that the order which actually became effective, and of which petitioners here complain, is not reviewable. In any event, however, we do not think the statute can be read as requiring adoption of a sort of inverse "negative order" doctrine. Cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125. See also Section 1006 (a) of the Act, quoted *supra,* p. 3. As the court below rightly held, a fair reading of Section 801 in the light of the purpose of Congress, and especially in view of the rationale of the *Waterman* case, *supra,* compels the conclusion that the order denying the transfer was subject to presidential approval and was properly submitted to him by the Board.

The first sentence of Section 801 of the Civil Aeronautics Act subjects to presidential approval "the issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation." Petitioners urge that, because this list does not specifically include the denial of a transfer of a certificate, such a denial does not need the approval of the President.[2] Their position, we submit, rests on a "meticulously literal reading" of the statute (R. 99) which is contrary to the spirit of the decision of this Court in the *Waterman* case. As was pointed out by the court below, if a denial of a transfer is not subject to presidential approval, the same must be true of the denial of an amendment, cancellation, suspension or revocation of a certificate. But in all such

[2] Petitioners cite *Cordova Air Service, Acquisition by Alaska Air Lines*, 4 C. A. B. 708, in which the Board's denial of an application to acquire an air carrier and to transfer a certificate to engage in overseas air transportation was not submitted to the President, as establishing an administrative practice in this regard. There is nothing in the *Cordova* case to indicate a conscious refusal to submit the matter to the President rather than a mere inadvertent failure to do so. Moreover, the case is the only one of its kind and it was decided long before the *Waterman* case, which focused attention on this issue. In the present case, early in the proceeding, in its order establishing the scope of the issues, the Board plainly indicated that its order would be submitted to the President for his approval. Order Serial No. E–2833 (R. 158, 161).

cases, the same "delicate issues of foreign policy" (R. 100) which make it desirable for the President to review the grant of an application may be present in the event of its denial. The argument that the President is not interested in a denial of a transfer because it effects no change in the status quo would apply as well to a denial of original certification which is expressly made subject to his approval. The important factor in all these cases is not whether the decision effects a change but rather that the Board has made a policy decision in an area "for which the Chief Executive has special responsibility." "Such decisions," as this Court said in the *Waterman* case, "are delicate, complex, and involve large elements of prophecy" and are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." (333 U. S. at 111).

Furthermore, the restricted interpretation of the first sentence of Section 801 to exclude the denial of a transfer from the requirement of presidential approval would be inconsistent with the second sentence of that section. By the second sentence Congress required that "copies of all applications in respect of such certificates * * * shall be transmitted to the President" and that "all decisions thereon by the Civil Aeronautics Board shall be submitted to the Presi-

dent before publication thereof." It is not reasonable to suppose that Congress would require the Board to submit to the President copies of all applications and their decisions thereon unless those decisions were intended to be subject to presidential approval.

The proceeding before the Board in this case was an extremely important one. The decision denying the transfer established, as effectively as the grant or denial of certification, the pattern, at least for the next few years, of American-flag air operation in the North Atlantic area. That decision was precisely of the sort which this Court, in the *Waterman* case, held Congress intended the President to make. Unless this Court wishes to depart from the rationale of the *Waterman* case, no useful purpose would be served by granting the petition.

2. As stated above, we believe that the question whether the order was subject to judicial review is dispositive of this case and was correctly answered by the court below. Petitioners, however, raise several other contentions, all of which, we feel, are without merit. They are dealt with, briefly, below.

(a) Petitioners contend that, even if the denial of a transfer is subject to presidential approval under Section 801, the President could not condition his approval of the transfer on the adjustment of the routes of the remaining carriers

because the question of changes in routes had not been considered by the Board. Their contention is not in accord with the facts.

The proceeding before the Board was not limited solely to the question of granting or denying the transfer but was expressly broadened, over the objection of the parties to the transfer (R. 159), to include consideration of adjustments in route patterns which might be necessary in the event the transfer was granted (R. 155, 158). The Board felt that "the determination of whether it would be in the public interest to have two rather than three American-flag carriers certificated in the North Atlantic area could not intelligently be made unless [they] could also indicate the route pattern of the two carriers, as [they] had the route pattern of the three existing carriers in 1945" (R. 161). At the hearing on the merits testimony was heard and exhibits introduced relating to possible route adustments (R. 40, 41). Moreover, one member of the Board, Mr. Lee, dissenting from the Board's denial of the transfer, said that he would grant the transfer provided appropriate adjustments in the routes were made. Mr. Lee's opinion coincided most nearly with that of the President.

(b) Equally without substance is petitioners' assertion that the decision below conflicts with that of the Court of Appeals for the District of Columbia Circuit in *Seaboard & Western Airlines* v.

Civil Aeronautics Board, 181 F. 2d 777.[3] The court in the *Seaboard* case simply held that it was not unreasonable for the Board in the instant proceeding to consider the question of adjustments in routes necessary in the event of approval of the transfer without entering upon consideration of the whole problem of North Atlantic routes. There is nothing inconsistent with that opinion in the decision of the court below.

(c) Petitioners also contend that the court below erred in failing to hold that there was no requirement of presidential approval at least as to that portion of the Board's order relating to PAA's acquisition of the assets of AOA. Their argument, in effect, is that although two aspects of the Board's order—that allowing the transfer of AOA's certificate and that amending PAA's and TWA's certificates—are not judicially reviewable, this third aspect of the order is reviewable. The opinion of the court below provides a complete answer to this contention:

> It may be that Board action on an acquisition of assets under section 408, 49 U. S. C. A. § 488, not involving the transfer of

[3] Prior to the institution of the proceeding involved here Seaboard Airlines had applied for certification to transport property only to certain points in Europe. When the instant proceeding commenced Seaboard moved the Board to consolidate its application in the hearing. The Board refused on the ground that it did not desire to open up the entire question of North Atlantic routes. Seaboard appealed from that denial to the Court of Appeals for the District of Columbia Circuit.

> a certificate, is judicially reviewable under section 1006 (a), 49 U. S. C. A. § 646 (a). But where, as in the present case, the acquisition of assets and the transfer or amendment of a certificate are inextricably mingled in the same proceeding, we think that the Congressional purpose to grant the President discretion as to overseas air transportation would be thwarted to permit judicial review of that portion of the order relating to acquisition of assets. No authority to the contrary has been brought to our attention. [R. 100–101.]

(d) Petitioners' final contention is that the order of July 10 was never "adopted" in that the Board members simply initialed the order individually before submitting it to the President for his approval. This, say petitioners, was not Board action. We submit that this contention is groundless and that there was "Board action" regardless of the mechanics of adoption by the Board. The order involved was prepared in response to the instruction of the President after his disapproval of the earlier order refusing the transfer (R. 147). On July 10, the Board met and directed that an order be prepared in accordance with the President's instructions (R. 139). The order was so prepared, initialed by the members and approved by the President (R. 139). Had no further action been taken prior to publication there would still be no reason for finding that the order had not been adopted. The Board,

as a Board, knew what the terms of the order were to be; sitting as a Board the members directed that it be prepared; after preparation they individually approved the order and presumably detected no departure from their directions. In any event, there was subsequent Board action with respect to the order: On July 14, 1950, TWA requested that the Board stay issuance of its order and reopen the proceedings (R. 165). The Board denied this request on the ground that "publication of its opinion and order dated July 10, 1950, is conducive to the proper dispatch of its business" (R. 166). Whatever defect there may have been in the original adoption was certainly cured by this action.

3. The court below based its dismissal of petitioners' suit on lack of jurisdiction to review the Board's order and did not pass on the question of petitioners' standing to challenge that order. Petitioners, however, seem to feel that the court tacitly ruled against them on the question of their capacity and consequently ignored certain of their contentions. We do not believe that there is any basis for supposing that petitioners' contentions received less consideration than they warranted. We do believe, however, that the court could properly have dismissed petitioners as being without standing to challenge the order.

Petitioners represent some two hundred employees of AOA, a number of whom are stockholders of that company (R. 20). As such they

were properly permitted to intervene in the proceeding before the Board (R. 146). Their capacity to contest the Board's order must, however, be measured by the standard of Section 1006 (a) of the Act which provides that review may be sought, in a proper case, by any person "disclosing a substantial interest" in the order. It is submitted that petitioners have not disclosed such interest, even if "substantial interest" requires no more than that a person be "adversely affected." Cf. *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F. 2d 810 (C. A. 2).

The Board's order specifically protected petitioners, as employees, from injury as a result of the transfer:

> It is ordered: * * *
>
> 5. That this proceeding be held open and jurisdiction be retained for the purpose of imposing such employee protective conditions as the Board may hereafter find to be appropriate and in the public interest;
>
> 6. That no person employed by Pan American World Airways, Inc., or American Overseas Airlines, Inc., upon the effective date of this order in their North Atlantic operations shall be discharged other than for good cause shown until further order of the board herein; * * *. [Order, Serial No. 4410, R. 154, 155.][4]

[4] See Secs. 401 (i), 408 (b), 49 U. S. C. 481 (i), 488 (b); *cf. United States* v. *Lowden,* 308 U. S. 225.

Nor do petitioners show that any interest as stockholders in AOA is threatened by the transfer. Instead they frankly admit that their chief interest in the case is to protect the public interest (Petition, p. 6). *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, and *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, on which petitioners rely, went no further than to permit judicial review at the instance of persons establishing that their interests were adversely affected. Petitioners have not shown any such interest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1950

No. 429

BRIAN O. SPARKS, BRANT PHILLIPS, JOHN SCOTT, ROY MOORE, WENDELL L. DANIELSON, FRANK T. HOTOPH, JOHN J. TAYLOR,
Petitioners,

vs.

CIVIL AERONAUTICS BOARD,
Respondent,

PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,
Interveners.

BRIEF OF PAN AMERICAN WORLD AIRWAYS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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vs.

CIVIL AERONAUTICS BOARD,

Respondent,

PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,

Interveners.

BRIEF OF PAN AMERICAN WORLD AIRWAYS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted by Pan American World Airways, Inc. (hereinafter referred to as "Pan American"), in opposition to the petition of certain former employees of American Overseas Airlines, Inc. (hereinafter referred to as "AOA") for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (Judges Swan, Clark and Frank).

By this judgment the Court of Appeals dismissed, for want of jurisdiction, appeals taken by petitioners and by Trans World Airlines, Inc. (hereinafter referred to as "Trans World"), from an order of the Civil Aeronautics Board authorizing the transfer to Pan American of AOA's certificate to engage in international air transportation. The Board's order was made in accordance with a direction of the President of the United States under Section 801 of the Civil Aeronautics Act of 1938, 49 U.S.C. 601. The Court of Appeals held that the President and the Board had acted within their legal powers and that consequently the Board's order was not reviewable under the rule in *Chicago & Southern Airlines* v. *Waterman S.S. Corp.*, 333 U. S. 103 (1948).

The judgment was entered on August 14, 1950. The opinion (by Judge Swan) is reported in 184 F. (2d) 66 (1950).

Statement of the Case

The order of which review by the Court of Appeals was sought was entered in a proceeding before the Civil Aeronautics Board called the *North Atlantic Route Transfer Case,* Docket No. 3589 *et al.* (R. 142-155).*

This proceeding arose out of applications filed December 15, 1948, for such authorizations under the Civil Aeronautics Act as were required to carry out an agreement between Pan American and AOA for the trans-

* For convenience, the abbreviations utilized in this brief in referring to the record are the same as those set forth in the footnote on page 6 of the Petition. These are as follows: P for Petitioners' Petition for Judicial Review; PR for Petitioners' Petition for Rehearing; A for Affidavits of H. J. Friendly *et al;* R for the portion of the record printed pursuant to stipulation; RB for the unprinted record before the Board. Other original documents filed in the Court below are referred to as OR.

fer to Pan American of all the property, assets and business of AOA, including AOA's temporary certificate of public convenience and necessity (expiring in July 1952) to engage in the air transportation of persons, property and mail between co-terminal points in the United States and various points in Europe. Pan American itself already possessed both permanent and temporary authorization to operate between the United States and Europe, including the major points authorized to be served by AOA.

Trans World, the third American-flag certificated transatlantic airline, intervened in opposition. Trans World was not satisfied to have the Board and the President consider the case on a basis where the only action that could be taken would be either an approval or a disapproval of the transfer of AOA's certificate to Pan American. It moved that the proceeding be broadened so as to permit the Board and the President to re-arrange the routes of Pan American and Trans World in the event that Pan American was permitted to acquire AOA (A 5-8 (Friendly affidavit, paras. 5 and 6)). A somewhat similar motion was filed by "Public Counsel", staff attorneys who, under the Board's practice, have virtually the same participation as a party in interest (A 8-10 (Friendly affidavit, para. 7)).

By Order Serial No. E 2512, dated March 1, 1949, the Board broadened the scope of the proceeding substantially as Trans World and Public Counsel had requested (R. 155-158). It instituted on its own motion a further proceeding, to be consolidated with the proceedings initiated on December 15, 1948, to determine whether if the transfer of AOA's certificate to Pan American was approved, the certificates of the surviving carriers "should be altered,

amended, or modified, in whole or in part" (R. 157-158). It did this upon the basis of a finding (R. 157):

> "that if said proposal is to be approved, the President and the Board should be able to alter, amend and modify the route patterns of the American-flag carriers across the North Atlantic, American Overseas, Pan American and TWA, as may be in the public interest, and should not be limited merely to action on the proposal submitted by Pan American and American Overseas".

By another order, also dated March 1, 1949 (Order Serial No. E 2514), the Board granted administrative intervention to Sparks, *et al.*, the petitioners herein, seven employees of AOA who asserted that they represented a larger group (RB 6930-32).

Subsequently, on May 19, 1949, the Board entered a further order (Serial No. E 2833) clarifying the scope of the broadened proceeding (R. 158-165).

The proceeding went to hearing on the issues as thus broadened. Extensive evidence was presented relating to the proposed acquisition and to the possible changes in the routes of Pan American and Trans World in the event that Pan American's acquisition of the certificate and assets of AOA was approved (A 12-18 (Friendly affidavit, paras. 9-14)).

The Board initially determined, by a divided vote, to disapprove the proposed acquisition. In accordance with Section 801 of the Act, the Board submitted this decision to the President for his approval "before publication thereof". Although the President approved this decision on June 29, 1950, he recalled his approval on the following day before publication of the decision and directed that the proposed order be returned to him. This was done. Upon

further consideration, on July 10, 1950, the President instructed the Board to approve the transfer of AOA's certificate to Pan American and to make certain changes in the routes of Pan American and Trans World, with a view to providing American-flag competition to the principal traffic points in Europe. The President's instructions to the Board were as follows:

"July 10, 1950

"My dear Mr. Ryan:

I have considered the letters from you and the other Board members in response to my request of June 30, 1950, in the North Atlantic Route Transfer Case.

My objective is to accomplish a route pattern in which our nation may have the benefit of competition to the principal traffic points in Europe, and to avoid a monopoly on the part of either of the United States carriers.

It is apparent that, as traffic points, London, Paris, Rome, and for the time being Frankfurt are the leading European cities. Therefore I desire that both remaining carriers be authorized to serve each of these points. In the case of Rome, which one of the carriers now serves both on its Shannon and its Lisbon routes, the other carrier should be similarly authorized. As to Frankfurt which is a principal air traffic point during and principally because of the American occupation of Germany, the TWA is to serve Frankfurt until the Board shall find that such service is no longer required in the interests of the American occupation of Germany.

This adjustment should result in the fullest accomplishment of the broad national objectives which, especially at this critical time, should govern the development of United States air transportation and will provide for vigorous competitive growth by our air lines.

It is most important that this matter be disposed of in the present proceeding without further delay in order that the carriers concerned may immediately go forward with plans for their needed further development.

Therefore, I have decided to approve the sale of American Overseas Airlines with the route adjustments set forth above. Please submit an order at once.

Very sincerely yours,

(Sgd) HARRY S. TRUMAN

Mr. Oswald Ryan
Acting Chairman
Civil Aeronautics Board
Washington 25, D. C."

The Board thereupon immediately prepared, adopted and submitted to the President an order carrying out his instructions. This was approved by the President on July 11, 1950. By this order, Serial No. E 4410 (R. 142-155), the Board and the President approved the acquisition by Pan American of the assets and certificate of AOA, conditioned upon certain route changes whereby Trans World was authorized to serve London and Frankfurt, points which had been previously served by both AOA and Pan American, and Pan American was authorized to serve Paris and Rome, points at which Trans World had previously held a monopoly of air service under the American flag. The order also contained conditions relating to protection of the rights of employees affected by the acquisition, and several supplemental orders on this subject have been issued (Order Serial No. E 4634, issued September 22, 1950; Order Serial No. E 4659, issued September 25, 1950).

On July 21, 1950, Trans World and the petitioners herein filed petitions in the United States Court of Appeals

for the Second Circuit to review Order Serial No. E 4410 and moved for a stay of the order pending determination of the appeals. Trans World named Pan American, AOA and American Airlines, owner of a majority of AOA's stock, as respondents along with the Board. The petitioners named only the Board as a respondent, but Pan American, AOA and American Airlines applied for and were granted the right to intervene.

Although the two appeals were not consolidated, oral argument was held on both before a full bench consisting of Judges Swan, Clark and Frank on July 26, 1950. The respondents and intervenors contended that the granting of a stay would be adverse to the public interest and would irreparably injure Pan American, AOA and American Airlines since, under the banking arrangements which Pan American had made, the transfer of AOA's assets and certificate to Pan American had to be carried out by the end of September, 1950. They contended also that the appeals were without substance. In this connection the merits were fully argued by both sides.

On August 14, 1950, the Court of Appeals rendered its decision. It dismissed the petitions of both Trans World and of the present petitioners for want of jurisdiction. It held that the President had acted within the authority granted him by Section 801 and that as a result the order of July 10, 1950 was immune from judicial review, under the rule laid down by this Court in *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948) and, previously, by the Court of Appeals itself in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (1941). The Court said (R 101-102):

> "For the foregoing reasons we think that the President and the Board acted within their legal powers in making the order of July 10th. If so,

> the court is without jurisdiction to review that order and the petitions for review will have to be dismissed when brought on for hearing. The issue has been thoroughly and capably argued on these motions. Nothing will be gained by postponing decision until final hearing. And an immediate decision on this issue may accelerate the parties' access to the Supreme Court, if they are disposed to seek it. Accordingly, the motions for a stay and other interlocutory relief are denied and the petitions for review are dismissed for lack of jurisdiction."

Petitioners did not avail themselves of the Court's suggestion that they promptly apply for "access" to this Court if they were disposed to do so. Instead, on August 29, 1950, the last day on which such a petition could be filed, they filed a petition for reconsideration and rehearing by the Court of Appeals. Petitioners did not then renew their request for a stay nor have they since asked either the Court of Appeals or this Court for a stay. The petition for reconsideration was denied by the Court of Appeals, without opinion, on September 6, 1950.

Pan American and AOA proceeded to carry out on September 25, 1950, as had been publicly announced some weeks in advance, the transaction approved by the President and the Board. At the close of business on that day Pan American paid AOA the purchase price of $17,450,000 and took over AOA's fleet of 19 airplanes, AOA's ground equipment, located in the United States and in 12 foreign countries, and most of its 1200 employees. At about the same time, the United States, acting under various bilateral agreements with foreign governments, designated Trans World (which had announced its acceptance of the Court of Appeals' decision) and Pan American to operate the new services authorized for them by the

order of July 10, 1950. In consequence, Trans World is now serving London and Frankfurt, and Pan American Paris and Rome. The purchase price received by AOA for its assets has been almost fully distributed to its stockholders.

The petition for a writ of certiorari now before this Court was filed on December 4, 1950, the last day on which such a petition could be filed.

Summary of Argument

Petitioners are met at the outset by the fact that they do not have the "substantial interest" in the order of the Board which is a prerequisite to their obtaining judicial review of that order. Section 1006(a) of the Civil Aeronautics Act, 49 U.S.C. 646(a), under which the petition for review was brought, extends this right only to persons having a "substantial interest". Petitioners sought to justify their intervention before the Board on their desire to preserve AOA as an independent institution having a special "way of life" (RB 7038-39), and on the possibility that they might be in a position to bid for the property or for American Airlines' stock interest if American was determined on a sale (RB 7040-42). Neither of these constitutes the "substantial interest" which the Act requires. Petitioners are not seeking to vindicate their interest in protection of employment, seniority and the like; that task was assumed by employee organizations, and petitioners do not, and are not in a position to, complain of what was done by the Board in that regard. There is no proof that any of the seven petitioners are themselves stockholders of AOA; therefore, even if they have in fact authority from other employees who do own a small amount of AOA stock, the petition cannot be sustained

as a "class suit" by stockholders since petitioners are not members of the class. Moreover, these stockholders had no interest as such "distinct from that of the corporation", *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385, 388 (1945), and petitioners do not criticize the fairness of the terms of sale. This bar to the granting of the petition will be dealt with in Point I below.

In Point II we shall show that there is not the slightest merit to the contention, upon which petitioners place their major reliance, that the Court of Appeals erred in holding that the President has the same authority over a Board order *disapproving* a transfer of a certificate to engage in international air transportation that he admittedly has over a Board order *approving* such a transfer. The reading which the Court of Appeals gave to Section 801 is the only reading consistent with its language, its history, its evident purpose, the judicial decisions construing it, the administrative practice under it, and common sense.

Finally, in Point III, we shall examine petitioners' other specifications of error and will show that there is neither merit nor general importance to any of them.

ARGUMENT

I

The writ should be denied because petitioners do not have a "substantial interest" in the order of the Board sought to be reviewed.

Section 1006 (a) of the Civil Aeronautics Act, 49 U. S. C. 646 (a) provides that an order of the Board shall be subject to review on petition "by any person disclosing a substantial interest in such order."

This language sets up a much stricter test of standing to sue than applies under statutes giving a right to judicial review to any "person aggrieved", although we do not believe petitioners would qualify even under statutes of the latter type. It was under statutes using the "person aggrieved" phraseology that persons not having a "substantial interest" were allowed judicial review in the decisions cited on page 30 of petitioners' brief, and in *American Power & Light Co.* v. *Securities and Exchange Commission, supra.* The difference in the rule under the two types of statutes was explained by this Court in the *American Power* case (325 U. S. 385, 390-91), where it said:

> "This court has not allowed the usual criteria of standing to sue to deny persons who, in analogous cases under that doctrine, would ordinarily not be permitted to invoke court review, the benefit of such review under statutes embodying *the same language* as §24(a) [citing *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14; *Federal Communications Comm.* v. *Sanders Bros. Radio Station,* 309 U. S. 470; and comparing *Singer & Sons* v. *Union Pacific Ry. Co.,* 311 U. S. 295]. The same is true of the lower Federal courts [citing *Associated Industries* v. *Ickes,* 134 F. (2d) 694]. In these instances *the extension of the privilege to persons aggrieved* was held to extend it to those not technically parties, and, therefore, not entitled, without the statutory provision, to initiate litigation in a court." (Emphasis supplied.)

In contrast, under statutes containing the "substantial interest" language, a person seeking review of action of a federal agency must show "that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a 'recognized' character,

at 'common law' or a substantive private legally protected interest created by statute." *Associated Industries* v. *Ickes,* 134 F. (2d) 694, 700 (2nd Cir. 1943). In other words, the "substantial interest" required is a definite legal right which has been or will be violated by the order in question. *Singer & Sons* v. *Union Pacific R. R. Co.,* 311 U. S. 295, 304 (1940); *Western Pacific California R. R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47, 51 (1931).

The granting of administrative intervention by the Board does not, of course, establish the requisite "substantial interest" on the part of the petitioners. Section 302.6 of the Board's Procedural Regulations states:

> "* * * Interventions provided in this section are for administrative purposes, and no decision to grant leave to intervene shall be deemed to constitute a finding or determination that the intervening party has such a substantial interest in the order that is to be entered in that proceeding as will entitle it to demand court review of such order."

Pittsburgh & West Virginia Ry. v. *United States,* 281 U. S. 479 (1930), held that the fact that a party had been allowed to intervene before the Interstate Commerce Commission did not entitle that party to institute a suit to set aside the Commission's order.

Before the Board, petitioners rested their claim to intervene on two grounds.

The first was certain emotional rights based on [RB 7039]

> "years of devotion to an institution known as AOA, which is now being threatened with absorption by a wholly different institution, with different management, different objectives and different conceptions, it is believed, of the public interest."

Clearly, however, the pangs that petitioners may have suffered as a result of the sale of AOA and the substitution of another employer do not give them the requisite "substantial interest".

The second ground was an allegation that "they represent capital anxious to enter the business of international air transportation" by purchasing AOA or the interest of American Airlines, the principal stockholder of AOA (RB 7040). However, petitioners' presentation before the Board made it evident that they neither had, nor ever had had, any reasonable expectation of securing the amount of capital necessary to that end [RB 2765-68, 2772-76, 2781-88, 2794-98, 2805-07, 2823-24], and if the evidence had been otherwise, the status of a would-be purchaser likewise would not meet the statutory test.

Petitioners' brief suggests (pp. 30-31) two other bases on which petitioners now seek to rely.

The first of these is their rights to protection as employees of AOA. However, in their petition for leave to intervene before the Board, petitioners specifically disclaimed relying upon any threat which the sale might involve to their continued employment. This, they correctly stated (RB 7039), "will be protected, it is believed, by the intervention of the organizations representing these various classes of employees." Six labor unions did intervene and present evidence as to the protection of the interests of employees who might be affected by the proposed transaction; petitioners made not the slightest presentation on the subject. The order of which review is sought has since been amended and supplemented by further orders of the Board dealing in great detail with the protection of the interests of the employees of AOA. Petitioners have not evidenced any concern with these orders, have not sought to have them reviewed by the Court of Appeals, and

do not complain of them now. No one disputes that under *United States* v. *Lowden,* 308 U. S. 325 (1939), cited by petitioners at page 30 of their brief, protection of the interests of employees of an air carrier party to a merger could properly be considered by the Board as an element in the public interest. But it by no means follows that this confers upon employees of a selling carrier a "substantial interest" in questions wholly unrelated to employee protection—particularly when the latter had been disclaimed as a basis for administrative intervention by the employees and no evidence on the subject had been presented by them.

The second ground now suggested by petitioners is that (p. 31) they "were minority stockholders of AOA". But here petitioners face a number of obstacles. There is no proof that any of the seven employees who filed the petition for review owns or ever owned any stock of AOA. The record before the Board contained no such proof, and an affidavit before the Court below showed that none of the petitioners was a stockholder of record of AOA at the time of the appeal (OR 113, Affidavit of E. S. Travers). To be sure there was evidence that, among the other AOA employees alleged to be represented by the seven petitioners, there were some who owned an aggregate of over 1,000 shares—out of a total of 1,750,000 shares outstanding. Whether or not petitioners can be considered representatives of this larger group for some other purpose, it is clear that, in the absence of stock ownership by petitioners, they cannot represent any interest of these other employees as stockholders. It is elementary that the plaintiff in a class action must be a member of the class sought to be represented. *Smith* v. *Swomstedt,* 16 How. 288 (1853); *Hansberry* v. *Lee,* 311 U. S. 32 (1940); *West* v. *Randall,* 29 Fed. Cas. No. 17424,

p. 718 (C.C.R.I., 1820); cf. Rule 23 of the Rules of Civil Procedure for the District Courts of the United States; *Pelelas* v. *Caterpillar Tractor Co.*, 30 F. Supp. 173 (D.C. S.D. Ill. 1939).

Moreover, this Court has held, in cases concerning orders of the Interstate Commerce Commission, that a stockholder interest *per se* is not sufficient to give a party standing to seek judicial review. Thus, *Pittsburgh & West Virginia Ry.* v. *United States, supra,* held that the Railway Company, as a minority stockholder of another company which had procured Commission authorization for certain business transactions, could not sue to set aside the Commission order, since (281 U. S. at 487):

> "The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order."

See also *Schenley Distillers Corp.* v. *United States,* 326 U. S. 432 (1946). Nothing in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385 (1945) is to the contrary since that case was decided under a "person aggrieved" statute and merely held that a stockholder "having a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission", might have standing to appeal from an order affecting the corporation (p. 388). The holders of 1,000 shares of AOA stock whom petitioners claim to represent had no "substantial financial or economic interest distinct from that of the corporation". Indeed, petitioners did not and do not claim that any economic interest of their alleged principals as stockholders was adversely affected

by the order of the Board at all; on the contrary, petitioners conceded the fairness of the price which AOA was to receive (RB 8696).

The Court below was not required to consider petitioners' lack of the "substantial interest" required for judicial review, since Trans World, which was then also an appellant, had such an interest. Here, however, it is clear that if a writ of certiorari were issued, it would ultimately have to be dismissed on this ground. Petitioners have no "private substantive legally protected interest" which they are seeking to vindicate. Their concern with the nation's international air policy is not the "substantial interest" which the Act requires.

II

The holding of the Court of Appeals that Section 801 of the Civil Aeronautics Act gives the President the same authority over a Board order disapproving a transfer of a certificate to engage in international air transportation that he has over a Board order approving such a transfer was plainly right.

Petitioners concede there can be no judicial review of the order of the Board and the President if Section 801 of the Civil Aeronautics Act required the Board to submit to the President for approval its initial decision proposing to deny the transfer. That question was put to rest by *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948). Petitioners contend, however, that although Section 801 requires the Board to obtain Presidential approval if the Board decides to *grant* a transfer of an international certificate, Section 801 does not require such approval if the Board proposes to *deny* the transfer.

The Court below correctly overruled this contention as contrary to the plain meaning of Section 801, to the purpose behind it, to the interpretation placed upon it by the courts, to the administrative practice, to the views expressed or acquiesced in by all parties to this very case until the moment when the President exerted his authority in a manner displeasing to some of them—and to common sense.

The Civil Aeronautics Act is, for the most part, a typical common-carrier regulatory statute, largely modelled upon the Motor Carrier Act. Section 801, however, represents a significant departure from the general regulatory pattern. It provides, in pertinent part, as follows:

> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof * * *".

In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948), this Court described the extent and significance of this departure as follows:

> "But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country, or any carrier seeks the sponsorship of this Government to engage in overseas or foreign air transportation, Congress has completely in-

> verted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication even can take place. Nor is the President's control of the ultimate decision a mere right of veto. *It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well.* And likewise subject to his approval are the terms, conditions and limitations of the order. 49 USCA §601. Thus, *Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.*" (333 U. S. at 109; emphasis supplied.)

The reasons for this complete inversion of "the usual administrative process" and for "the President's control of the ultimate decision" need not be left to inference. The hearings before the Congressional Committees on the bill which eventually became the Civil Aeronautics Act of 1938, and the debates in Congress itself, show that Congress had two principal sets of considerations in mind—*first,* the considerations of national defense and foreign relations involved in air transportation outside of the continental borders, which made it important that the President, with the special intelligence available to him, should have the ultimate decision, and, *second,* the President's constitutional powers as Commander-in-Chief and as the nation's organ in foreign affairs, which made it doubtful that Congress *could* deprive him of final authority in this

field.* Both these factors were noted in this Court's opinion in the *Waterman* case, *supra,* at pp. 108, 109-110.

Section 801 was adopted to accomplish these broad purposes. Congress neither intended nor understood that the President was authorized to act only upon affirmative orders of the Board, as petitioners contend. Rather it was intended and understood that Section 801 gives the President authority over "any action" of the Board with respect to certificates and foreign air carrier permits. This is made clear by the report of the House Committee on Interstate and Foreign Commerce on H. R. 9738 of the 75th Congress, the bill in which Section 801 originally appeared (H. R. Rep. 2254, 75th Congress, p. 11). This report described Section 801 in the following terms:

> "Section 801: The President of the United States:—This section provides that *any action* of the Authority *with respect to* a permit authorizing a foreign air carrier to operate to this country, or a *certificate* authorizing an American air carrier to operate in overseas or foreign air transportation or between places in the same Territory or possession, shall be subject to the approval of the President." (Emphasis supplied.)

Petitioners' argument rests primarily on what the Court below called "a meticulously literal reading of the first sentence of Section 801" (R. 99). They contend that since Section 801 subjects to the approval of the President the "issuance" and the "denial" of a certificate, the failure of Section 801 expressly to refer to a

* Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, 3rd session, 1938, on H.R. 1938, pp. 37-40, 136, 146-148, 408-411; 83 Cong. Rec. 8653, 8654.

"refusal to transfer" a certificate excludes such an order from the President's authority. Their argument is that in order to give the President the power over negative as well as affirmative proposals of the Civil Aeronautics Board which the legislative history shows it desired, Congress would have had to word Section 801 in some such way as "the issuance or denial, transfer or refusal to transfer, amendment or refusal to amend, cancellation or refusal to cancel, suspension or refusal to suspend, or revocation or refusal to revoke" etc.

Courts do not require Congress to draw statutes in this manner. They give effect to the basic intent. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457 (1892); *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 542-544 (1940); *Johnson* v. *United States*, 163 Fed. 30, 32 (1st Cir. 1908), per Holmes, J.

Moreover, petitioners' microscopic method of statutory construction runs into immediate difficulty in the second sentence of Section 801. That sentence, quoted above (p. 17), clearly required the *application* for the transfer of AOA's certificate to Pan American to be transmitted to the President "before hearing thereon." Petitioners do not dispute this. In the Court of Appeals they conceded also that the requirement that "all decisions thereon" be *submitted* to the President "before publication thereof" applies to decisions denying proposed transfers of international certificates as well as to decisions granting them, although they argued that in the former situation this was merely as a courtesy (Brief in support of Petition to Stay, pp. 21-22). Confronted by the logic of Judge Swan's observation that "This [submission] would seem purposeless unless he [the President] had power to approve or disapprove the Board's decision" (R. 100), petitioners changed their ground and now con-

tend (Brief, p. 22) that a Board decision denying a transfer application is not required to be sent to the President at all. This contention, however, flies in the face of the language "all decisions *thereon*," *i.e.*, on "*all applications in respect of*" international, overseas and territorial certificates and permits, "shall be submitted to the President before publication thereof." A denial of a transfer application is as much a "decision thereon" as a granting of it. Why then, as Judge Swan said, bother the President by submitting such a decision to him if he has no power to act? Congress did not mean simply to increase the President's reading-matter.

The niggling construction of the powers of the President under Section 801 urged by petitioners cannot, of course, be limited to "transfer." As noted by the Court below (R. 100):

> "If the denial of a transfer is not subject to Presidential approval, the same must be true of the denial of an amendment, cancellation, suspension or revocation of a certificate."

With respect to all these actions, petitioners are forced to contend that the President's power under Section 801 covers only a portion of the territory, and that portion, as we shall now show, bounded in a whimsical manner unrelated to the need for Presidential supervision. An interpretation leading to such a result would defy the rule repeatedly laid down by this Court that "all laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *United States* v. *Katz*, 271 U. S. 354, 357 (1926). *United States* v. *American Trucking Associations,*

Inc., supra; Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 332-33 (1938).

Take, first, a case in which an American-flag carrier applies for suspension or cancellation of a certificate to operate to a foreign country. The Board, acting on purely economic grounds and on pleas of users as to the detrimental effect of discontinuance of the service upon them, proposes to deny the application. The President, however, has information from "available intelligence services whose reports are not and ought not to be published to the world" (333 U. S. at 111) that the aircraft and personnel involved may be subject to serious hazard, giving rise to a possible international incident. This would seem precisely the type of case where Congress would have wanted the President to be the ultimate arbiter. Petitioners say, however, that the President would be completely powerless to overrule the Board—although he admittedly could have either prevented or insisted upon the service when it came before the Board initially.

Petitioners recognize the need to supply some rationale for the results to which their construction inevitably leads. They seek to do this by a theory that Section 801 comes into play only when the Board is proposing something new, involving "serious issues of foreign policy" and requiring "further diplomatic implementation" (Brief, pp. 19-20), but not when the Board is simply insisting on continuation of the *status quo*.

Petitioners' theory does not square with the realities. As shown by the case just put, serious diplomatic consequences can ensue from refusing to change a situation just as well as from making a change. Another case in which this would be even more clear would be where the Board refused to sanction the transfer, not of a "certificate," the form of license issued to an American-flag car-

rier, but of a "permit," the form of license issued to a foreign-flag carrier. Frequently, an application for transfer of a permit would be made with the approval or, indeed, even at the behest of the foreign government whose citizens were involved.* Granting such an application would hardly involve the United States in diplomatic difficulties, yet this admittedly is subject to Presidential approval. Suppose, however, that the Board should propose to deny such a transfer application on the ground, for example, that other activities of the proposed transferee would make its competition with our own carriers more severe than that of the transferor. Here is a clear case where the diplomatic problem would arise from the *denial* of the application and Presidential intervention might be necessary to prevent difficulties in our international relations. Yet, on petitioners' construction of Section 801, the President would be powerless.

Another fallacy in petitioners' rationale is its failure to take account of the military as well as diplomatic reasons underlying the grant of power to the President in Section 801. This is demonstrated not only by the considerations referred to above (p. 22) but by the fact that Section 801 applies to operations between the continental United States and the Territories, and even within a territory, to precisely the same extent as to operations between the United States and foreign countries. While, as we have shown, petitioners' assumption that failure to change the *status quo* cannot have *diplomatic* consequences is wholly unrealistic, they can scarcely even urge this in the military field. In this very case the President may well have been of the view that the national defense would be better

* See *Airways (Atlantic) Limited, Permit to Foreign Carrier*, 2 C.A.B. 181 (1940), where the permit transfer was sought in pursuance of an Act of Parliament reorganizing British civil aviation.

served if American-flag air operations to areas in which the national security is so vitally at stake were confided to two stronger rather than to three weaker hands.

Our discussion thus far has been concerned with transfers, suspensions and cancellations. But the absurd results that would flow from petitioners' whittled-down construction of Section 801 is clearest of all in the case of "amendment". Petitioners concede, of course, that Section 801 gives the President overriding powers in one instance of Board refusal to alter the *status quo,* namely, denial of an application for *issuance* of a certificate. Yet their construction forces them to say that the President has no such overriding power where the Board denies an application for *amendment* of a certificate already issued, although as pointed out by the Court below (R. 100):

> "The same delicate issues of foreign policy which make it desirable for the President to review a decision with respect to granting amendment of a certificate may be present in a decision to deny amendment. It would be in the highest degree formalistic for a court to say that the President may review one and not the other."

Just how "formalistic" will become even plainer when the Court realizes that it is largely accidental whether a new international or overseas or territorial air service is granted as a new certificate or as an amendment to an existing certificate.

Northwest Airlines, Inc., et al., Pacific Case, 7 C.A.B. 209 (1946), will illustrate the point. Hawaiian Airlines, which operated a service among the Hawaiian Islands and which had previously applied for (but had not received) a certificate between Hawaii and the United States, applied for a *certificate* between Hawaii and Tokyo. Pan Ameri-

can, which already held a certificate between the continental United States, Hawaii and Hongkong, applied for an *amendment* of its certificate to include, among other things, this identical Hawaii-Tokyo operation. On petitioners' construction, when the Board granted Pan American's application and denied Hawaiian's, the President could have vetoed the Board's action *granting* Pan American's *amendment* application and could have directed the Board to reverse its action *denying* Hawaiian's *certificate* application. On the other hand, if the Board had *granted* Hawaiian's *certificate* application and had *denied* Pan American's *amendment* application, while the President could have vetoed the former, he would have been powerless, if he believed that Pan American could furnish the service to the country's greater advantage, to bring that result about by disapproving the *denial* of Pan American's *amendment* application. Yet he could have accomplished this result if only Pan American had applied, as it could have done, for a *new* certificate between Hawaii and Tokyo and not merely for an *amendment* of its existing certificate between the continental United States, Hawaii and Hongkong.

Surely it is not to be supposed that Congress intended the great powers which it desired to confer upon the President by Section 801 to be dependent upon procedural niceties of this character.

Petitioners' attempt to escape from this dilemma leads them into an even deeper morass. They argue (Brief, p. 21) that sometimes an amendment is not really an amendment, even though stated to be such; it is really an application for a new certificate. Any such distinction would be impossible to administer since in each case where the carrier had called its application an amendment and the Board had recommended against it, either the Board or the President,

or both, would have to make a collateral determination whether what the carrier called an amendment was an amendment within the meaning of Section 801 or merely an ill-baptized application for a new certificate, and presumably this determination would be subject to judicial review. Is this determination to depend on the number of miles involved? On whether another country is involved? Or is it to be wholly subjective? What of the fact that an "amendment" to a certificate normally confers rights different from an additional certificate, namely, the right to conduct air transportation directly between points on either side of the junction? Do petitioners say that such an amendment may convey all the added rights and privileges ordinarily pertaining to an "amendment", and yet, if sufficiently extensive, not constitute an "amendment" for purposes of Section 801? The fact that petitioners' construction forces them to urge distinctions such as these affords sure proof of the correctness of the reading given to the statute by the Court of Appeals and by all others who have been concerned with it.

The Board has regularly submitted denials of applications for amendments to the President and the President has acted on them in precisely the same way as applications for new certificates. It is true that in many of these cases both kinds of applications were consolidated for hearing—further illustration of the impracticability of drawing any distinction between them—and they were dealt with in one order; but if petitioners' construction were correct, the Board should have segregated the denial of the amendments and not made these subject to Presidential approval. Moreover, there have been at least two important cases in which the denial of an amendment was dealt with separately by the President. *Continental Airlines, Inc. et al., Texas Air Service,* 4 C.A.B. 478

(1943); *Pacific Northwest-Hawaii Service* case, 9 C.A.B. 414, 580 (1948).

Against this settled administrative practice, petitioners rely on a single case, *Acquisition of Cordova Air Service, Inc. by Alaska Airlines, Inc.*, 4 C.A.B. 708 (1944), in which the Board denied an application for the transfer of a certificate for intra-territorial air service and apparently did not transmit its order to the President for approval. This is all too slender a reed to sustain the burden which petitioners place upon it. Failure to obtain Presidential approval of this decision may merely reflect an inadvertent omission by employees of the Board. Certainly the Board made no *ruling* that the decision did not have to be sent to the President. As noted above, the second sentence of Section 801 expressly requires such a decision to be submitted to the President before the decision could be published, and if it was not so submitted, the Board acted improperly.

Finally, as bearing on the proper interpretation of Section 801, is the fact that throughout the long and bitterly contested administrative proceeding in this case, all parties clearly understood that, whether the Board's recommendation was affirmative or negative, final decision would lie with the President. This view was expressed time and again from the beginning of the proceeding to its end, with no question as to its correctness raised by petitioners or anyone else. Indeed, the attorney of record for petitioners in this Court, who represented another party in the proceeding before the Board, concluded his brief with the statement "* * * the Board should *recommend* that the proposed acquisition of AOA by Pan American be disapproved." (RB 9306; emphasis supplied.) This was an entirely proper recognition of the plain meaning of Section 801, as this had always been